1964

Gordon L. Weight v. Harry B. Miller : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

GORDON L. WEIGHT,

Plaintiff and Respondent

—vs.—

HARRY B. MILLER, and HARRY B. MILLER, dba LORRAINE PRESS,

Defendant and Appellant.

Case No.

10037

Brief of Appellant

Appeal from a Judgment of the Third Judicial District Court for Salt Lake County

Honorable Merrill C. Faux, Judge

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In the Supreme Court of the State of Utah

GORDON L. WEIGHT,
Plaintiff and Respondent
—vs.—
HARRY B. MILLER, and HARRY B. MILLER, dba LORRAINE PRESS,
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NATURE OF THE CASE

This is an action on a promissory note by Plaintiff Weight, as payee, to recover $1200., interest in the sum of $392.00 and attorney's fees of $348.33 and costs of $15.00 from Defendant Miller, the maker.

Said note was executed by defendant on January 2, 1960 for $1200.00 which he received the previous September from plaintiff as part payment due in connection with an employment agreement entered into by the parties on October 1st, 1959.

The note was due October 1, 1960, and the date of the note was changed, at plaintiff's request, from January 2, 1960 back to September 1, 1959, the month the $1200.00 was paid by plaintiff to defendant.

By the terms of the October 1, 1959 agreement, plaintiff agreed to pay in a total of $5,000.00 to defendant to buy into a going printing business. At that time it was owned and operated individually, by defendant.

Inter alia, the agreement provided that defendant would incorporate this business, together with its assets, within one year. Further, and in consideration of plaintiff putting up $5,000. that defendant would convey $5,000. worth of corporate stock to plaintiff, plus an additional amount equal to 8% interest from the time of his investment.

However, plaintiff paid in only $1200. and either couldn't, or wouldn't, pay in the additional $3800.00. Defendant honored the terms of the agreement including hiring plaintiff at a stipulated salary through December 1959. On January 2, 1960 the plaintiff persuaded defendant to prepare the promissory note for $1200.00, referred to herein, and did not thereafter return to work for the defendant. Instead, he was hired by another printing company.

Defendant claims that the $1200. paid to him by plaintiff in September 1959 was part of the $5,000.00 which plaintiff was to invest. Further, that plaintiff defaulted the $1200.00 by failing to pay the balance due of $3800., or, at most, was entitled only to $1200. worth of stock in defendant's corporation, per the provisions of the employment agreement.

Plaintiff contends the $1200. note was in no wise related to the agreement between the parties and

that he is entitled to his money, interest, costs and attorneys fees.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Utah found for plaintiff and granted judgment to him for the $1200., plus $392. interest, attorney's fees of $348.33 and $15. costs against Defendant.

RELIEF SOUGHT ON APPEAL

Defendant Harry B. Miller seeks a reversal of the decision of the court in awarding this money judgment; the Plaintiff Gordon L .Weight seeks to have sustained the decision of the court in awarding him this judgment.

STATEMENT OF FACTS

During the autumn of 1959 plaintiff approached defendant and told him that he had some ideas for making money in the printing business, namely by going into the offset printing phase, (R 63, 64 & 65) further that he could get $5,000. to invest in Defendant's business, provided he would hire plaintiff and give him a financial interest in the business. After several discussions (R 65) during which they agreed upon the general terms, the parties retained plaintiff's attorney, Ray Montgomery, to draw up the agreement, which was to become effective on October 1, 1959.

After the initial discussions, and before the papers were signed, plaintiff paid defendant sums of $700. and $500., totalling $1200. Defendant used the first $700. as down payment on one of two printing presses which were needed in the new offset printing venture. By paying cash within 35 days on the one machine, the parties could save $700. (R 67). With assurances from plaintiff that he could get the balance due of $3800. defendant purchased the printing press, but later had to borrow money to pay for it, at high interest rates, when plaintiff failed to pay the balance he had agreed. (R 69).

The October 1, 1959 agreement executed by both parties, (Exhibit 2-d) had 8 provisions, 6 of which are material here. These provided (1) Agreement would be for one year; (2) Both parties were to devote full time and attention to this business; (3) Plaintiff was guaranteed a salary based on the union pay scale, payable twice each month, and defendant was to bear any losses sustained in the business; (4) Plaintiff was to use his own auto, but was to be reimbursed for gas and oil and other business expenses; (5) Plaintiff was to loan defendant $5,000. "to be used for the furtherance of the business and is to be secured by a personal note with" . . . 8% interest, and said "promissory note is hereby referred to and incorporated within this document as part of the agreement" . . . (6) Defendant agreed to incorporate the business within one year, repay plaintiff in the form of stock of the corporation and also give him an option to buy up to a total of 25% of all the corporate stock at par value, and to appoint

plaintiff as a director when the corporation was formed.

Plaintiff worked for defendant from October 1 through December 31, 1959, and received the agreed salary and expenses (R 40, 52, 53 &58). Plaintiff never paid any more on his $5,000. committment, although defendant often reminded him of it (R 61, 71, 81).Each received a copy of the written agreement. Attorney Montgomery had prepared a note, which was undated, unsigned, and with the amount left in blank which plaintiff claims he gave to defendant, but which defendant denies ever seeing, (R 70). Finally, on January 2, 1960, after plaintiff continued to complain to defendant about not having any evidence for his $1200. investment, defendant told plaintiff to go out and buy a note and that he, defendant, would sign it. (R 72). This was done and defendant had the form note made out for $1200., with 8% annual interest, from October 1, 1959; it provided for attorney's fee. When plaintiff noted that the note was dated January 2, 1960, he requested defendant to date it back to September 1, 1959, in order to protect him on the 8% interest which he had coming, which defendant did. (Exhibit 1-P) (R 73). After receiving the executed note for $1200. from defendant on January 2, 1960, the plaintiff never reported for work again, although he did come back on January 18, for a $16. gas expense check, at which time he told both the defendant and the bookkeeper, Ruth Marks, that he was working for a competitor printing firm (R 54, 85, 86).

Defendant and Mrs. Marks each testified that Defendant did incorporate his printing business, The Lorraine Press, on September 30, 1960, prior to the end of the one year period provided for in the agreement (R 46). Too, the certified copy of the articles of incorporation indicate the meeting of incorporation was held on September 27, 1960, with said articles being received by the Secretary of Utah on September 30, 1960. (Exhibit No. 10-d). Further that Plaintiff's name, Gordon L. Weight was shown in Article VI as an incorporator, and in Article VII as a director, although the name was later drawn through and the name of Defendant Miller's attorney, Thomas P. Vuyk, was written in.

Defendant testified that plaintiff worked well for the first two months after which time both defendant and the bookkeeper testified that plaintiff broke appointments with customers, never reported in to the office and otherwise indicated a loss of interest in his work (R 74, 76). Mr. Montgomery, the attorney friend of plaintiff, who drew the business agreement of October 1, 1959 testified that defendant telephoned him in December 1959 and reported that he was disappointed in the plaintiff's work at that time and that he might have to let him go. He likewise testified that he had a talk with plaintiff a week prior to this "at his own home." Plaintiff complained to Montgomery that he hadn't been taken into the management and executive part of the business, and that he was supposed to be, according to the agreement. (R. 99 & 100). However, the agreement (exhibit 2-d) does not provide anywhere for bringing

plaintiff into management or as an executive of the business. At this time Mr. Montgomery said he told the plaintiff that he hadn't better breach the contract by quitting, or he would be in default on the contract, and the plaintiff told his lawyer that he would continue working. (R. 100). During the same period, December 1959, plaintiff claims that defendant told him that he was now on a 10% commission, effective immediately, because of his lack of production in the business (R 28). However, both defendant, and the then bookkeeper, Mrs. Marks, testified that he was paid his full salary through December 1959 (R 40, 52, 88) and that he was the one who breached the agreement by quitting work with defendant and taking employment elsewhere.

The defendant was not certain whether plaintiff was still working for him or not, until the plaintiff told him and Mrs. Marks, on January 18th, 1960, when he came for his gas expense check, that he had another job with Eric Seaich Company (R 41, 54, 85) for whom he was employed for six or seven months thereafter.

Defendant told plaintiff on one occasion when they met in the State Capitol Building, after defendant had incorporated the business that he, the plaintiff, did have stock coming for the $1200., but that he would not make a cash settlement. (R 79). Neither party ever agreed that the $1200. note was to be paid for in cash and there is no evidence that the note was given as anything more than an indication that plaintiff had $1200. of his $5,000. invested into the business. (R 39).

POINTS URGED FOR REVERSING THE DECISION OF THE LOWER COURT.

POINT I. DEFENDANT SHOULD EITHER HAVE BEEN ENTITLED TO RETAIN THE $1200. PAID IN UNDER THE TERMS OF THIS EMPLOYMENT AGREEMENT, OR, IN THE ALTERNATIVE, TO PAY PLAINTIFF IN THE STOCK OF THE CORPORATION TO BE FORMED, AS SPECIFIED IN SAID AGREEMENT.

Plaintiff admits that he paid in only $1200.00 of the $5,000 agreed upon in the employment agreement. Further, he admits that this $1200. paid in, in September 1959, was part of the sum of $5,000 which he had agreed to pay in on the agreement. (R 17, 25, 39). Further, that the $1200. note which he persuaded defendant to sign on January 2, 1960 was for the $1200.00 he paid in as part of the employment agreement of September 30, 1959. (R 17, 25, 39).

There was no evidence that there was a mutual agreement to terminate this employment contract.

Defendant, before the end of the 12 month term of the employment agreement, did incorporate the Lorraine Press from the assets of the individual printing business which he owned, and as required by this agreement between defendant and plaintiff. (See certified copy of Articles of Incorporation — exhibit 10-d).

Although there were evidences of disharmony between the parties, concerning the employment and salary portion of the agreement, there was no demand by either party upon the other in this re-

gard, although appellant stated he made numerous requests upon plaintiff for the balance due of $3800. on his investment in appellant's business. (R 67, 68, 71, 81, 82, 83, 84).

Plaintiff's exhibit (exhibit 3-P), an undated, unsigned, and incompleted note, is relied upon by him to claim that, as evidence of the original intent of the parties when the employment agreement was drawn, it shows that he was entitled to **money,** not **stock,** for his $1200. because this unsigned document so stated. However, upon close examination of this unsigned note, it is indicated that the language relied upon by respondent reads, **"Should there be a default in the foregoing provisions,"** . . . then the money, rather than the stock, is to be paid. The **"foregoing provision"** referred to refers to the duty of the appellant to incorporate, obviously, and reads,

"It is hereby agreed that the said ..... dollars shall be paid in the form of stock of a corporation from the assets of the Lorraine Press on or before the due date of the note or within a reasonable length of time thereafter."

If this exhibit 3-P is to be given any credence by the court, it should be accurately read and interpreted, and in conjunction with the employment agreement of September 30, 1959 which reads, in the last sentence of the Sixth paragraph therein: **"The promissory note is hereby referred to and incorporated within this document as part of the agreement between Harry B. Miller and Gordon L. Weight."**

This unsigned, "Promissory Note", exhibit 3-P, and the Agreement exhibit 2-D, which incorporates it into and makes it a part of said Agreement, provides for the payment "in the form of stock of a corporation". If there is a default in this provision, i.e. if the corporation is not formed, **"or should the parties mutually agree to terminate their agreement"** which they did not do, then all of the money paid in would become due and payable. When read together, no other conclusion is tenable in this action.

Defendant testified that he had offered $1200. in stock, plus interest, to plaintiff, and alleged the same in his Answer (R 23, 79).

Plaintiff testified that he never returned to work after January 2, 1960, which was the date he persuaded defendant to sign the $1200. note, althought he never advised defendant that he was quitting, and never asked for nor received a termination slip; some two weeks later, when he went back for a gas expense check, plaintiff states he mentioned that he was going to work for Eric Seaich (another printer), although defendant and witness Ruth Marks testified that he stated he was then working for Seaich, which was the first they knew of his not working for Lorraine Press (R 41, 54, 85, 86).

Plaintiff also testified that he was not paid for the last two weeks of December 1959, while employed by defendant; however defendant's bookkeeper testified from her records, and defendant likewise testified that plaintiff received salary checks, based on the employment agreement

through December 1959, as well as gas expense payments (R 40, 52, 53, 88).

Defendant stated that he felt obligated to incorporate within the one year period, or it would have been necessary to refund the $1200. sum which plaintiff had paid in on his $5,000. committment. Unless incorporated, defendant states that he knew he would have been in default and would have had to repay plaintiff in money (R 77, 93). Both defendant and Mrs. Marks testified that the incorporation papers were received by the Secretary of State of Utah on September 30, 1960 (R 46).

Defendant testified that he wasn't happy with plaintiff's performance during December 1959, but that he wasn't so unhappy with him as to terminate him (R 86, 87) and admitted talking with him about the salary he was receiving and which was considerably more than the salesman's commission he would have received on the business he had produced (R 87, 88, 89). Defendant must not have known, when he signed the $1200. note for plaintiff on January 2, 1960, that plaintiff had, as of that time, decided to quit his job with defendant. Otherwise he would not have signed the note without ascertaining that he might be binding himself for payment of money ,rather than stock.

POINT II. DEFENDANT SHOULD NOT BE PENALIZED BY PERMITTING PLAINTIFF TO TREAT THE PRINTED NOTE FOR $1200., AS HAVING NO RELATIONSHIP TO THE EMPLOYMENT AGREEMENT AND BY HAVING THE LOWER COURT ALTER THE TERMS OF THE AGREEMENT

FROM PAYMENT IN "STOCK" TO PAYMENT IN "MONEY".

Utah's Rules of Civil Procedure, Rule 16, states, in part, such (pretrial) order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." In the instant case ,there was no modification of the pre-trial order, nor amendment of the pleadings. Instead, the lower court required several issues to be developed, which defendant was not prepared to meet, and which were completely foreign to the single pre-trial question. This was prejudicial error to defendant. Subject to the qualification that the court may modify its order, the parties are bound by the pre-trial order. In support of this rule are Fowler vs. Crown-Zellerbach Corp. 163 F 2d 773 (CCA9th) and Fanciullo vs. G. B.G. & S. Theatre Corp. (Mass) 8 NE (2d) 174.

The court's pre-trial terms may not be contradicted, according to Ringling Bros. vs. Olvera (V CCA9th) 119 F2d 584, and Berry vs. Spokane RR Co. (Oreg) 6 FR Serv 16.32, Case 1, and 2 FRD 483. Further, the court should not give instructions contrary nor inconsistent with its pre-trial order. Bryant vs. Phoenix Bridge Co. (Me) 43 F Supp 162 and E. W. Baker vs. Lagaly (CCA 10th) 144 F2d 344. Both parties are bound, equally, by the pre-trial order, Daitz Flying Corp. vs. U.S. (NY) 8 FR Serv 16.23, Case 1, 4 FRD 372.

In the instant case there was no "manifest injustice" to prevent. And, if the pre-trial order did not

properly reflect the contentions of the parties, it could have been set aside, before the trial, and a new conference ordered. No one contended the order was inadequate in this case. Authority for this is an Oregon case, Calvin vs. West Coast Power Co. 5 FR Serv 16.33, Case 1, 2 FRD 248.

Defendant testified, and it was not rebutted, that by December 1959, plaintiff had mentioned that it didn't look as if the $5,000. investment was going through; further that he, plaintiff, did want some evidence that he had loaned $1200. to defendant, at which time defendant instructed him to make up a note, which was done. Defendant, at plaintiff's request at that time, also dated back the note to conform to the month, September 1959, which was the month plaintiff stated he had made the $1200. down payment on the $5,000. (R 72, 73).

The actions of the plaintiff in obtaining the $1200. note on January 2, 1960, never returning to work thereafter, nor asking for a termination slip would indicate that he had then mentally resolved to leave the Lorraine Press. If he had not been quitting defendant's employment, surely he would have asked for the last two weeks pay ,to which he was entitled, and which he claims he didn't get, as well as a termination slip, which would have enabled him to obtain unemployment benefits while seeking other employment.

Counsel for the plaintiff contended, at the trial that the $1200. note signed by defendant on January 2, 1960, and then dated back, at plaintiff's re-

quest, to September 1, 1959, was a different promissory note from any note referred to in the contract, and therefore had nothing to do with the employment agreement of September 30, 1959. (R 8, 9). Plaintiff also stated that he could not see what the employment agreement had to do with the $1200. promissory note (16).

However, plaintiff testified that the executed note for $1200. was obtained to replace the note originally prepared by his counsel, and which was lost or misplaced before it was executed by appellant (R 10, 39, 65, 70). Plaintiff likewise stipulated that the date of January 2, 1960, on the $1200. note was changed back to September 1, 1959, and that the $1200. paid to defendant in September 1959, and evidenced by this note in the same amount, was part of the $5,000. which plaintiff agreed to pay defendant, per the terms of the employment agreement (R 11, 12).

Plaintiff further testified that there was no urgency in paying in the $5,000., which he agreed to pay. (R 13). However, he knew that defendant was going to use the money to buy a new press for $4,000. in furtherance of the business. (R 13, 14).

When that portion of the employment agreement was read to plaintiff which required defendant to incorporate within a year, and to pay plaintiff in stock for monies invested, at 8% interest, he indicated that he was thoroughly familiar with these terms, although he had no information as to whether the incorporation actually took place

(R 15, 17, 18). Further, in January 1960, during a discussion, plaintiff reminded defendant of their contract (R 28), indicating that he considered it in existence at that time.

POINT III. THE LOWER COURT ERRED IN DETERMINING MORE THAN THE ONE QUESTION AGREED UPON AT THE PRE-TRIAL, NAMELY, WHETHER THE $1200. NOTE WAS ANY PART OF THE EMPLOYMENT AGREEMENT.

The Lower court erred in failing to grant defendant's motion to dismiss the complaint of plaintiff's after testimony given by the plaintiff clearly show that the $1200. note was part of the employment agreement between the parties. (R 42).

The court then erred further in determining whether the agreement had ever been mutually terminated, in admitting a copy of the original note, in blank, which was never executed, and which was prepared by plaintiff's attorney at the time the agreement was prepared (R 33).

Although the plaintiff testified that the $1200. note was part of the agreement, which was the only question to be determined, and at which point plaintiff's case should have been dismissed, the lower court still ruled that the agreement had been "scrapped" and the note for $1200. was for monies had and received, and not repaid (R 102, 103).

Defendant's motion to dismiss plaintiff's action should have been granted after testimony given by the plaintiff indicated that the $1200. note was defi-

nitely part of and related to the employment agreement entered into by the parties. Plaintiff stated a recoverable claim, but failed to prove it in the evidence given by him at the trial. Utah Rules of Civil Procedure, rule 41 (b); Rasmussen vs. Davis, 1 Utah (2d) 96; 262 P (2d) 488; Alvarado vs. Tucker, 2 Utah (2d) 16; 268 P (2d) 986.

In this type of employment contract, where additional consideration, other than services, moves from the employee to the employer, in the absence of terms of the contrary, such agreements may continue as long as the employee is able and will to do his work satisfactorily. This rule is recognized in an Indiana case, Pa. Co. vs. Dolan, 32 N.E. 802 and in Skagerberg vs. Blandin Paper Co. (Minn.) 266 N.W. 872.

Other cases say this right continues as long as the employer is in business and needs the employee's services. In accord are Carnig vs. Carr, (Mass.) 46 N.E. 117 and Rape vs. Mobile & O. R. Co. (Miss.) 100 So. 585.

If defendant had fired plaintiff, as claimed, the former had numerous rights of action against defendant. Instead, plaintiff accepted other employment, for less money, he stated, (R 21) and without actually notifying defendant that he was quitting his job. When plaintiff learned that his investment would not enable him to start out as an executive, in the management of the business, and that he would have to work for his salary, he arbitrarily decided to quit. (R 36, 99, 100).

Defendant's position is that plaintiff breached the employment agreement when he failed to return to work in January 1960. Defendant went on and later incorporated, within the 12 month period required by his agreement with plaintiff. Defendant, in effect, waived the breach by the plaintiff and did not sue on said breach, neither for the balance of $3800. pledged, nor by plaintiff leaving his employment. Defendant was within his rights to keep the agreement in force and to later incorporate. Snowball vs. Maney Bros. Co. (Wyo.) 270 Pac. 167., Forbes vs. Appleyard, (Mass.) 63 N.E. 894 and In Re Hook (DC.) 25 F (2d) 498. Subscribing to this rule also is Page on Contracts, 2nd Edition, Sections 3038, 3042, and 3060.

CONCLUSION

We respectfully submit that the Court erred in giving a decision against defendant Miller and in favor of plaintiff Weight for $1200., plus $755.33 attorneys fees, interest and costs.

The testimony given several times by plaintiff Weight clearly shows that the $1200. promissory note, executed by defendant Miller, was without question, part of the employment agreement referred to, a copy of which was attached to the Answer, and the original of which was introduced as plaintiff's Exhibit 1-P.

The pre-trial order stated that this was the only question for the Trial Court to determine; on the

basis of the plaintiff's own testimony in the Record, we submit that the Trial Court erred in holding that the note should have been paid in dollars, instead of in stock, as was provided for in the employment contract.

Respectfully submitted,

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